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DAMAGES IN SECTION 1983 ACTION CONTROLLED BY STATE LAW:

*Jones v. Hildebrandt*,

550 P.2d 339 (Colo. 1976), *cert. dismissed*, 97 S. Ct. 2283 (1977).

INTRODUCTION

On June 16, 1977, the United States Supreme Court in a *per curiam* opinion dismissed a petition for certiorari in the case of *Jones v. Hildebrandt*.<sup>1</sup> This opinion cast serious doubts upon the continuing validity of the Colorado Supreme Court's interpretation of the interplay between actions brought pursuant to 42 U.S.C. section 1983<sup>2</sup> and the state's wrongful death statute.<sup>3</sup>

This comment will first examine the Colorado court's rationale in dismissing plaintiff's section 1983 action. Then the questions raised—and as yet left unanswered by the United States Supreme Court's dismissal—will be discussed with an eye toward the potential for a separate section 1983 recovery in Colorado today.

I. THE WRONG

On the evening of February 5, 1972, Denver police officers Hildebrandt and Moran, responding to a silent alarm, came upon plaintiff's son, Larry Jones, in an alley next to an abandoned building. Believing Larry to be a possible burglary suspect, Hildebrandt gave chase, and when the suspect would not stop, Officer Hildebrandt drew his weapon, shot, and killed Larry Jones.<sup>4</sup>

Mrs. Ruby Jones, mother of the deceased, brought an action on her own behalf against Officer Hildebrandt and the City and County of Denver in the state District Court for the City and County of Denver. She sought compensatory and punitive damages for the allegedly unlawful killing of her son. As amended, her complaint stated three claims for relief: (1) for battery under

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<sup>1</sup> 550 P.2d 339 (Colo. 1976), *cert. dismissed*, 97 S. Ct. 2283 (1977).

<sup>2</sup> Civil Rights Act of 1871, ch. 22, § I, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1970)).

<sup>3</sup> COLO. REV. STAT. § 13-21-202 (1973). *Action notwithstanding death*.

When the death of a person is caused by wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured.

<sup>4</sup> Petitioner's Brief for Certiorari at 3, *Jones v. Hildebrandt*, 97 S. Ct. 2283 (1977).

state law; (2) for negligence under state law; (3) for violation of federal constitutional rights.<sup>5</sup> The state court treated the first two claims for relief as being authorized by the state wrongful death statute, and the third was treated as authorized by section 1983.<sup>6</sup>

The defendants admitted the shooting but asserted that Officer Hildebrant was acting within the scope of his authority as a Denver law enforcement officer.

The case proceeded to trial on all of plaintiff's claims. At the close of proof, defendants moved to dismiss plaintiff's federal claim. The trial judge granted the motion on the ground that the section 1983 claim was "merged" with the state law claims, and that no relief different from that recoverable under the state-law claims was available under section 1983. The case thus went to the jury on plaintiff's state-law claims only. On the issue of damages, the jury was instructed that the plaintiff was limited to recovering the net pecuniary loss she sustained as a result of her son's death, with a maximum allowable recovery of \$45,000;<sup>7</sup> future earnings, loss of society, and exemplary damages were held to be unrecoverable under the state wrongful death statute.<sup>8</sup> The jury resolved the issues of liability under state law in favor of the plaintiff and returned a verdict of \$1,500. The trial judge denied a motion for a new trial.<sup>9</sup>

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<sup>5</sup> 550 P.2d at 341.

<sup>6</sup> The complaint as filed was drawn in common law pleading style and made no specific reference to either the state wrongful death provision or section 1983. However, all courts in the case have construed claims one and two as being under the wrongful death statute and claim number three as being authorized by section 1983.

<sup>7</sup> COLO. REV. STAT. § 13-21-203 (1973). *Limitation on damages*.

(1) All damages accruing under section 13-21-201 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both section 13-21-201 and section 13-21-202 and in all cases the plaintiff is required to elect under which he will proceed.

<sup>8</sup> For a critical discussion of the Colorado pecuniary loss limitation, see, Note, *Blind Imitation of the Past: An Analysis of Pecuniary Damages in Wrongful Death Actions*, 49 DEN. L.J. 99 (1972) (authored by David K. Rees, counsel for plaintiff in *Jones*).

<sup>9</sup> Petitioner's Brief for Certiorari at 2, *Jones v. Hildebrant*, 97 S. Ct. 2283 (1977).

### A. Appeal

Mrs. Jones then appealed the lower court's verdict on the issue of damages. Of the three allegations made on appeal, only one, petitioner's claim that the federal section 1983 cause of action should not have been "merged" with the state wrongful death action, will be discussed in this comment.<sup>10</sup>

In support of the uniqueness of her federal claim, petitioner advanced four distinct theories which were recognized and discussed by the Colorado court.<sup>11</sup> The first theory, which was described by Justice Hodges in his majority opinion as being "confusingly stated," was that petitioner's "civil right to her son's life," as recognized by the state wrongful death statute, "was denied her without due process of law through his wrongful killing."<sup>12</sup> The court interpreted this claim as being solely an attempt to exercise a right to sue for damages. The court then turned to a discussion of what constitutes a right to "property" or "liberty" as set forth in the recent United States Supreme Court case, *Paul v. Davis*.<sup>13</sup>

In *Davis*, a section 1983 action for injuries allegedly inflicted upon plaintiff's reputation, the Court ruled that the right to sue for defamation was not a "liberty" or "property" right protected by the fourteenth amendment.<sup>14</sup>

On the basis of this decision, the Colorado court reached the conclusion that

[t]he right to sue becomes a right protected by the Fourteenth Amendment only when the statutorily guaranteed access to the courts is denied. Therefore, where, as here, the state allows a plaintiff to bring her suit, she is not deprived of any of her civil rights without due process of law.<sup>15</sup>

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<sup>10</sup> Mrs. Jones asserted three issues on her appeal to the Colorado Supreme Court: (1) Her damages under the wrongful death statute were unconstitutionally restricted by the net pecuniary loss rule; (2) her recovery was inadequate, as a matter of law; and (3) additional damages should have been permitted under her section 1983 claim because that cause of action was not limited by the pecuniary loss rule. 550 P.2d at 341.

<sup>11</sup> *Id.* at 341-45.

<sup>12</sup> Justice Hodges wrote the opinion for the majority. Justice Kelly did not participate. Chief Justice Pringle, joined by Justice Groves, dissented, saying, "I respectfully dissent. I do not believe that Colorado's judicial limitation of net pecuniary loss as a measure of damages for wrongful death applies to actions founded upon 42 U.S.C. § 1983 (1970)." *Id.* at 346.

<sup>13</sup> 424 U.S. 693 (1976).

<sup>14</sup> *Id.* at 712.

<sup>15</sup> 550 P.2d at 343.

The second of plaintiff's arguments was that although section 1983 does not expressly create a wrongful death action for a violation of civil rights, a different section of the same act, section 1988,<sup>16</sup> "authorizes the incorporation into federal law of state wrongful death remedies to vindicates of civil rights that result in death."<sup>17</sup> The court agreed with petitioner's claim on this point and also agreed that the purpose of the incorporation was to "effectually implement the policies of the legislation."<sup>18</sup> However, the court would not accept the second part of plaintiff's argument that although section 1988 required incorporation of state law in certain circumstances it did not require the acceptance of the state limitations regarding damages. The Colorado Supreme Court concluded

that Colorado's wrongful death remedy would be engrafted into a §1983 action if brought in a federal court. However, because the instant suit was brought in State court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the §1983 claim should be dismissed.

Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law on damages should also apply.<sup>19</sup>

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<sup>16</sup> 42 U.S.C. § 1988 (1970): *Proceedings in vindication of civil rights.*

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

<sup>17</sup> *Id.*

<sup>18</sup> The Colorado court as 550 P.2d 339, 343, n.4, set forth the proposition that federal courts have ruled that section 1988 permits the incorporation of the state's nonabatement statutes and wrongful death statutes into section 1983 actions in order to effectively implement the policies of that legislation. In support of this proposition the court referenced the following cases: *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Hall v. Wooten*, 506 F.2d 564 (6th Cir. 1974); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961); *Javits v. Stevens*, 382 F. Supp. 131 (S.D.N.Y. 1974); *Troutman v. Johnson City*, 392 F. Supp. 556 (E.D. Tenn. 1973).

<sup>19</sup> 550 P.2d at 344.

The court also rejected petitioner's third theory of recovery, "that a federal wrongful death remedy impliedly exists in section 1983, independent of the state wrongful death remedies."<sup>20</sup> While acknowledging that the United States Supreme Court had ruled that federal wrongful death remedies impliedly exist in some areas of the law,<sup>22</sup> the court decided to base its decision on three other factors: (1) The court's perception of Congressional intent not to preempt state remedies in the area of wrongful death, (2) the adequacy of the state remedy in death cases to vindicate civil rights violations, and (3) the "overwhelming acceptance of state remedies in the federal courts."<sup>23</sup>

Petitioner's final theory for obtaining a separate recovery under her section 1983 claim was that she was deprived of her own constitutional rights. In the words of Justice Hodges, "[S]he alleges in her complaint that *her* rights were violated because her child's right to life, his freedom from physical abuse and intimidation, and his right to equal protection of the laws were violated."<sup>24</sup> The court concluded, however, that these deprivations were really those of the son and that

one may not sue for deprivation of another's rights under §1983, and that a cause of action can be maintained only by the "person injured." She therefore cannot sue in her own right for the deprivation of her son's rights apart from her remedy under the wrongful death cause of action.<sup>25</sup>

Furthermore, the court concluded that the state, by wrongfully killing Mrs. Jones' son, did not directly attempt to restrict her own personal decisions relating to procreation, contraception, and child rearing which were involved in cases such as *Griswold v. Connecticut*<sup>26</sup> and *Meyer v. Nebraska*.<sup>27</sup> The court concluded:

Although the death of a family member represents a loss to her, we nonetheless, are of the opinion that § 1983 was not designed to

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<sup>20</sup> *Id.* at 344.

The case acknowledged by the court was *Morange v. States Marine Lines*, 398 U.S. 375 (1970), where the United States Supreme Court held that an implied action for wrongful death based upon the seaworthiness of a vessel was maintainable under federal maritime law. *Id.* at 345, n.10.

<sup>22</sup> 55 P.2d 339.

<sup>23</sup> *Id.* at 345.

<sup>24</sup> *Id.* at 345 (emphasis added).

<sup>25</sup> *Id.* at 345 (footnotes omitted).

<sup>26</sup> 381 U.S. 479 (1965).

<sup>27</sup> 262 U.S. 390 (1923).

compensate for those collateral losses resulting from injuries to others. Otherwise damages would infinitely extend not only to parents and children, but to siblings and perhaps even to a "family" of close friends. *The interests protected by §1983 are adequately vindicated when actions are brought by injured parties themselves, or at their death, by those designated in our wrongful death statute.*<sup>28</sup>

## II. THE RIGHT

As is so often the case in legislation born out of compromise, section 1983 is general in its language and utilizes terms not carefully defined. Courts which have sought guidance within the provisions of the statute itself have been frustrated by its lack of specificity. Others, which have turned to the legislative history of the act, have found strong advocacy in favor of a multitude of positions. Thus, lawmakers have found in section 1983 a flexible legal tool. Passed in the post-Civil War reconstruction period to provide a remedy for plaintiffs who were not receiving adequate protection from state laws, it lay dormant for almost half a century.<sup>29</sup>

The case in which the statutory skeleton of section 1983 was first firmly fleshed out by the Court was *Monroe v. Pape*.<sup>30</sup> *Monroe* involved an illegal search and seizure of a black couple's home by thirteen Chicago policemen.<sup>31</sup> In his opinion, Justice Douglas examined the legislative history of the section and formalized "three main aims" of the act: (1) To "override certain kinds of state laws"; (2) to "provide a remedy where state law was inadequate"; and (3) to provide "a federal remedy where the state remedy, though adequate in theory, was not available in practice."<sup>32</sup> These three goals of section 1983 as formulated by Justice Douglas are significant in that they have provided the authority by which subsequent courts have been able to expand the scope of the section 1983 cause of action.

After *Monroe*, there was a rapid increase in cases filed under section 1983.<sup>33</sup> Many offenses which had previously been actiona-

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<sup>28</sup> 550 P.2d at 345 (emphasis added).

<sup>29</sup> Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy*, 26 IND. L.J. 361, 362 (1951).

<sup>30</sup> 365 U.S. 167 (1961).

<sup>31</sup> *Id.* at 174.

<sup>32</sup> *Id.* at 183.

<sup>33</sup> According to one source:

Between the enactment of the statute [§ 1983] in 1871 and 1939, only 19 §

ble only in state courts under state tort theories became section 1983 violations.

More recently, the Court, in an attempt to stem the "rush to the federal" courthouse,<sup>34</sup> has begun to give a more restrictive interpretation to the prerequisites of a section 1983 cause of action.<sup>35</sup>

In *Paul v. Davis*<sup>36</sup> the Court made a direct attack upon the substantive rights protected under the fourteenth amendment and thus actionable under section 1983.

In *Davis*, an individual attempted to secure damages under section 1983 against police officers for alleged damage to reputation. The plaintiff's picture had been circulated on a flyer identifying "active shoplifters" despite the fact that charges against the plaintiff for shoplifting had been dropped.

The Court recognized that the police activity would have been actionable under the law of defamation in the state court, but ruled that this alone was insufficient to support a section 1983 action even though state officials happened to be the defendants. This decision relied on the fact that in addition to the "under color of state law" requirement, section 1983, unlike state tort actions, required the deprivation of a constitutionally protected right. Unlike the clearly unconstitutional search and seizure present in *Monroe*, the plaintiff in *Paul v. Davis* was unable to point to any specific constitutional guarantee safeguarding one's reputation from state intervention. Thus he could show no cognizable liberty deprivation. The Court observed that the due process clause alone was not in itself a source of protected liberty interests so as to become an embodiment of general tort law.

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1983 cases were reported. In fiscal 1960, the year prior to *Monroe*, only 280 cases were filed. By 1970, the number had mushroomed to 3,586, and the upward trend continued in 1971 with a 30 percent increase to 4,609. One estimate placed the number of actions filed in 1973 at approximately 8,000.

Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 FLA. L. REV. 904, 915 (1976).

<sup>34</sup> Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOCIAL ORDER 557, 559.

<sup>35</sup> For a discussion of the post-*Monroe* restrictions on the Civil Rights Act, See, Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 FLA. L. REV. 904 (1976); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969); Comment, *Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size*, 15 DUQ. L. REV. 49 (1976).

<sup>36</sup> 424 U.S. 693 (1976).



*Davis* was a verbalization of the Court's growing disenchantment with section 1983 as a cure-all statutory remedy. It was also the case cited by the Colorado court in its rejection of Mrs. Jones' section 1983 claim. At the time *Jones* came to trial in Colorado, it was clear, under *Monroe*, that civil rights suits could be brought against state officials alleging specific constitutional deprivations such as illegal search and seizure. This protection was specifically provided for by the fourteenth and fifteenth amendments. However under *Davis*, other interests such as reputation were not actionable under section 1983 due to the Court's failure to recognize them as being fundamental rights. Other than these specific cases, lower courts had little upon which to base decisions in the area.<sup>37</sup> Yet it was clear that fears of a federalization of the state tort system had prompted a new wave of court-imposed limitations on section 1983 actions.

Some issues, such as what rights were protected under section 1983, had been established as clearly federal concerns. For other issues, such as which statute of limitation to apply, the use of state law was well settled.<sup>38</sup> Other issues, however, such as the survivability of actions, defenses available, and measure of damages, were not so easily categorized. For assistance, the courts looked to a second provision of the Civil Rights Act.

Section 1988 addressed the question of what law should apply in proceedings taken in vindication of civil rights. The section provides that federal law shall control where "suitable" and that state law shall be used to achieve the purposes of the act or to provide suitable remedies where federal law is deficient.<sup>39</sup>

This concept, however, is more simply stated than applied as is shown in the almost ten years of litigation surrounding the infamous section 1983 case, *Shaw v. Garrison*.<sup>40</sup>

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<sup>37</sup> One test proposed by commentators is Judge Friendly's opinion in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), where it was suggested that conduct which "shocked the conscience," as defined in cases such as *Rochin v. California*, 342 U.S. 165 (1952), would allow an action to be brought under section 1983. Comment, *Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size*, 15 DUQ. L. REV. 49 (1976).

<sup>38</sup> In *O'Sullivan v. Felix*, 233 U.S. 318 (1914), an action arising out of the predecessors of 42 U.S.C. § 1983, it was held that there was no federal limitations statute applicable to a civil damage action under the federal civil rights statutes and that the limitation statutes of the state in which the cause of action arose controlling.

<sup>39</sup> 42 U.S.C. § 1988 (1970).

<sup>40</sup> 391 F. Supp. 1353 (E.D. La. 1976), *rev'd sub nom.* *Robertson v. Wegmann*, \_\_\_ U.S. \_\_\_ (1978). See note 44, *infra*.

In *Shaw*, a civil action was brought by plaintiff against Garrison and others with whom he allegedly conspired to deprive Shaw of his civil rights by prosecuting him in bad faith for conspiracy to assassinate President Kennedy.<sup>41</sup>

After the commencement of the action, but prior to trial, the plaintiff died. He was not survived by any of the classes of individuals upon whom an action, other than one for damage for property, inured under Louisiana law.

It was clear that state law could be properly incorporated into section 1983 when it furthered the court-interpreted purposes of the Civil Rights Act.<sup>42</sup> In *Shaw*, however, the more difficult situation was presented. The district court was forced to decide whether to incorporate a state survival provision it felt was contrary to the purpose of section 1983 and allow the action to abate or to turn to federal law. The court refused to apply state law, finding it inconsistent with federal law, and in its place created a "federal common law of survival in civil rights actions in favor of the personal representative of the deceased."<sup>43</sup> Thus, at the time *Jones* came to trial in Colorado, *Shaw* clearly stood for the proposition that state law need not be incorporated via section 1988 when it stood in opposition to the purposes of section 1983.<sup>44</sup>

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<sup>41</sup> The complaint alleged causes of action under 42 U.S.C. §§ 1983, 1985, and 1986.

<sup>42</sup> 42 U.S.C. § 1988 (1970). The Supreme Court said of section 1988 in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969):

This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statute. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need wherever a federal right is impaired.

*Id.* at 240 (citations omitted).

<sup>43</sup> 391 F. Supp. at 1368. A similar result was obtained in the following cases: *Spence v. Stares*, 507 F.2d 554 (7th Cir. 1974); *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965); *Rhoads v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967); *Washington v. Official Court Stenographer*, 251 F. Supp. 945 (E.D. Pa. 1966); *Tracy v. Robbins*, 40 F.R.D. 108 (C.D.S.C. 1966); *Antelope v. George*, 211 F. Supp. 657 (N.D. Idaho 1962).

<sup>44</sup> Subsequent to the dismissal of certiorari in *Jones*, *Shaw v. Garrison*, 391 F. Supp. 1353 (E.D. La. 1976), was first affirmed by the United States Court of Appeals for the Fifth Circuit, 545 F.2d 980 (1977), and then reversed by the Supreme Court, *sub nom.* *Robertson v. Wegmann*, \_\_\_ U.S. \_\_\_ (1978). Three justices, including two of the dissenters in *Jones* (White and Brennan), joined in a strongly worded dissent.

The majority opinion accepted the basic thrust of the plaintiff's argument that state law need not be incorporated into section 1983 actions when inconsistent with the purposes of the act, yet ruled that in the situation presented, Louisiana law was not so at odds with the purposes of section 1983 as to be stricken in favor of federal common law. *Robertson v. Wegmann*, \_\_\_ U.S. \_\_\_ (1978).

This was the precedent which Mrs. Jones presented to the Colorado Supreme Court upon appeal. She argued that the restrictive Colorado provisions regarding damages were too inconsistent with the purposes of section 1983 to be incorporated into the federal statute. It was argued that the Colorado Supreme Court should reject the state's damage limitations just as the federal district court had rejected Louisiana's limitation on survivability.<sup>44</sup>

### III. THE REMEDY

If a plaintiff's interests are to be protected by a state statute to such an extent that the federal action may be dismissed, one would think that the remedy available in the state courts would be completely coextensive with that available in the federal courts. However, an examination of the provisions of the Colorado wrongful death statute quickly points out severe limitations present at the state level which are not present in the federal action.

The Colorado wrongful death statute, as interpreted by the Colorado Supreme Court, is limited only to the recovery of compensatory damages for the loss of decedent's services and support and does not permit the recovery of damages for the survivor's grief, sorrow, and emotional distress.<sup>45</sup> In addition, the trial court in *Jones* ruled that the wrongful death statute did not permit the recovery of punitive damages, nor a recovery in excess of \$45,000 because the plaintiff was not dependent upon the deceased.<sup>46</sup> Also, Colorado has expressly described the wrongful death action as being only a "property tort action" and not as a tort action "for injuries done to the person."<sup>47</sup> Finally, the Colorado statute says nothing about compensation for the loss of a civil right.

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The Court admittedly limited the decision:

Our holding today is a narrow one, limited to situations in which no claim is made that state law generally is inhospitable to survival of § 1983 actions and in which the particular application of state survivorship law, while it may cause abatement of the action, has no independent adverse effect on the policies underlying § 1983. A different situation might well be presented . . . if state law "did not provide for survival of any tort actions," or if it significantly restricted the types of actions that survive. We intimate no view moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death.

*Id.* at \_\_\_\_ (citations omitted).

<sup>44</sup> 550 P.2d at 342.

<sup>45</sup> *Id.* at 341.

<sup>47</sup> *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930 (1949).

Clearly these limitations do not apply to an action brought pursuant to section 1983. The Colorado court realized that it was under a duty, when evaluating the section 1983 claim, to interpret and apply federal law. The court agreed with the plaintiff that section 1983 did not expressly create a survival action, and that section 1988 required the incorporation of state law. However, it was at this point that the Colorado court decided that section 1988 mandated the conclusion that the Colorado remedy constituted the exclusive determinate of damages and remedies available under a section 1983 action.<sup>48</sup> The court acknowledged that it was applying federal law via section 1988, yet failed to look beyond the familiar state law to a body of well established federal common law in fashioning a remedy.<sup>49</sup>

The Colorado court based its dismissal of plaintiff's section 1983 action upon the grounds that it was "merged" with the state statutory remedy. The court did not further define this term nor did it cite authority for the proposition. The commonly accepted definition of the term "merger" as applied to causes of actions refers to the situation where one person takes or acquires "a remedy in legal estimation higher than that he already possesses for the same right."<sup>50</sup> It is then said that by exercising your right to the greater remedy you allow the lesser right to merge into the cause of action pursued.<sup>51</sup>

It is hard to see how this definition applies to a section 1983 cause of action brought in a state court. Section 1983 actions by definition must involve constitutional violations which would

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<sup>48</sup> The Colorado court in *Jones* stated that the state's wrongful death limitations would be "engrafted" into a section 1983 action even if brought in a federal court. 550 P.2d at 344. However, section 1983 does not mandate this result. As discussed above section 1988 operates only when federal common law is found deficient, and then incorporates state law only to the extent that it is inconsistent with the purposes of the Act. 42 U.S.C. § 1988 (1970).

<sup>49</sup> It has been held that where federally protected rights have been invaded, the courts will adjust their remedies so as to grant the necessary relief. This is true even though the federal statute provides for only a general right to sue for such invasion and does not address an available remedy to make good the wrong done. *Bell v. Hood*, 327 U.S. 678 (1946).

<sup>50</sup> BLACK'S LAW DICTIONARY 1140 (4th ed. rev. 1968).

The term merger has also been used in criminal law where the identical criminal act constitutes two or more offenses such as where the same act is both a felony and a misdemeanor. The rule is the lower grade merges with the higher. *State v. Smith*, 190 Mo. 706, 90 S.W. 440 (1905).

<sup>51</sup> BLACK'S LAW DICTIONARY 1140 (4th ed. rev. 1968).

presumptively be placed on a legal tier higher than that of state common law or statutory causes of action.

Section 1983 is a vehicle for the vindication of individual constitutional rights. Justice Harlan's concurring opinion in *Monroe* stressed that the "deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."<sup>52</sup> This description of section 1983 hardly seems to place it in the mergable category.

Possibly, the Colorado court meant by the term "merger" that two actions were identical from the standpoint of remedies available; however, since section 1983 provides a more extensive remedy than the Colorado wrongful death act, with its \$45,000 maximum recovery, this does not seem to be the case. In comparison to the plaintiff's wrongful death actions, section 1983 is clearly a separate legal remedy. The section was enacted for a specific purpose, at a different time, granting jurisdiction for different offenses, to remedy different ills, in a different way than does the Colorado wrongful death statute.<sup>53</sup> Section 1983 has no net pecuniary loss limitation imposed. Section 1983 has no statutory limitation for individuals without dependents. Additionally, the section has been interpreted to allow punitive damages.<sup>54</sup> The two actions are clearly not identical, nor do they provide equal remedies.

The identity of remedies was crucial to the Colorado Supreme Court's ruling, but, as seen above, the remedies simply are not identical. Under federal law the loss of a civil right alone is compensable, even though it is not accompanied by a pecuniary loss.<sup>55</sup> The measure of compensation in section 1983 actions, though at times difficult to assess, has been considered great.<sup>56</sup>

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<sup>52</sup> 365 U.S. at 196.

<sup>53</sup> It has been generally held that where two causes of action are granted by statute without the second enactment expressly or impliedly supplanting or abrogating the first, the newer remedy is not to be considered exclusive but rather cumulative. This is true even where the separate remedies are given under state and federal statutes. *Jenkins v. S. Ry. Carolina Div.*, 152 S.C. 386, 150 S.E. 128 (1929) (allowing joinder of a cause of action brought under Federal Employers Liability Act and a state wrongful death statute).

<sup>54</sup> *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965).

<sup>55</sup> *Rhoads v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967).

<sup>56</sup> *Faber v. Rizzo*, 363 F. Supp. (E.D. Pa. 1973).

The Colorado decision limiting plaintiffs solely to the wrongful death provisions has prevented every consideration of whether or not such plaintiffs should be compensated for a constitutional deprivation.

#### IV. THE RATIONALE

The Colorado court dismissed plaintiff's section 1983 claim, saying that her rights were adequately protected by the state cause of action and the state remedy. This conclusion was reached by an analysis which emphasized that if a federal cause of action existed—whether brought in a federal or state court—it would be controlled completely by the state damage limitations. This basic assumption lies at the heart of the Colorado court's rejection on all four of plaintiff's arguments for the establishment of a section 1983 claim.

Apparently, what the Colorado court did was to look at the interest sought to be protected and decide that it either was not protectable under the rationale of *Davis* or was adequately protected by the bringing of a wrongful death action in state court. Thus, the section 1983 action was dismissed.

The same rationale was used in rejecting plaintiff's second argument for her section 1983 claim. The court agreed with plaintiff that the statute itself was silent on survival and that section 1988 required resort to state law to the extent that such state law was compatible with federal law. However, the majority of the court would not accept petitioner's contention that the Colorado statutory limitations, such as the net pecuniary loss provision, were totally incompatible with the interests protected under section 1983. By accepting state law as being completely compatible with the purposes of section 1983, the court was not forced to apply the next echelon of authority—federal common law.<sup>57</sup>

Petitioner's third argument began where her second left off. The claim stressed that, even in the absence of section 1988 (directing courts to state law where compatible), section 1983 itself created a *constitutional* cause of actions independent of state law limitations. The Colorado court recognized that such a right to federal wrongful death remedies impliedly did exist in some limited areas; however, they refused to accept these cases as being

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<sup>57</sup> *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

controlling in *Jones*. Instead, the court relied upon a perceived Congressional intention not to preempt the state's "carefully wrought wrongful death remedies."<sup>58</sup>

While this argument has some validity it is by no means conclusive. Federal courts do develop rules of law and decisions in selected areas of particular federal concern.<sup>59</sup> It would appear that the protection of civil rights as defined in the Constitution would be such an area of federal concern even in the absence of the provisions of section 1988.

In *Morange v. States Marine Lines Inc.*,<sup>60</sup> the case acknowledged by the Colorado court, a plaintiff sought to bring a wrongful death action against the owner of a vessel upon which her husband had been killed. At the time of the husband's death the vessel was within the navigable waters of the state of Florida. Neither federal statute nor Florida law provided for a wrongful death action based upon the seaworthiness of a vessel. Yet, in *Morange* the Court held that an action does lie under general maritime law for death caused by violation of general maritime duties. Thus, the creation of remedies for wrongful death is not limited merely to statutory law, and there exists authority for the creation of wrongful death actions within federal common law also. This position, however, was rejected by the Colorado court in favor of a perceived Congressional intent not to preempt state wrongful death remedies. Yet, federal preemption has been exercised in at least two areas involving wrongful death actions. A federal policy in favor of the survivability of wrongful death actions and the awarding of punitive damages has been applied as a matter of federal common law in clear opposition to state policies. Such preemption has been exercised *whenever* state law has been found to be in opposition to the purpose of section 1983.

Petitioner's final and potentially most significant argument in favor of a separate section 1983 claim received but superficial treatment by the Colorado court. This was the claim that she was

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<sup>58</sup> 550 P.2d at 345.

<sup>59</sup> See Friendly, *In Praise of Erie - and the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). Among the areas where federal courts are developing a common law, Friendly lists interstate disputes, some national banking practices, government contract law, labor contract law, unfair competition, regulation of interstate carriers, and defamation by multi-state media. 39 N.Y.U. L. REV. 383, 408-18.

<sup>60</sup> 398 U.S. 375 (1970).

deprived of her own constitutional rights by the police shooting of her son. Although the court said these rights were not very well articulated, the issue was definitely before the court. The Colorado court stated that there was no deprivation of a constitutional right because the state did not directly attempt to restrict plaintiff's own personal decisions relating to procreation, contraception, and child rearing which were issues involved in cases such as *Griswold v. Connecticut*<sup>61</sup> and *Meyer v. Nebraska*.<sup>62</sup> The question thus presented was, what is the definition of a legally protectable liberty interest? The term "liberty," as contained in the due process clause of the fifth and fourteenth amendments, has been held to denote more than mere freedom from bodily restraint. It also guarantees the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and to bring up children.<sup>63</sup> The Court has clearly recognized the right to procreate;<sup>64</sup> *Jones* posited the question whether this right to conceive children could be expanded to give a mother the right to raise her child free from any wrongful taking by the state.

This specific question was addressed by the Eighth Circuit in a case which is strikingly similar to *Jones* on its facts, *Mattis v. Schnarr*.<sup>65</sup> In *Schnarr*, a father whose son had been shot and killed while attempting to escape arrest as a fleeing felon, brought a section 1983 action against the police officers who shot his son. The two cases differed, however, on the defenses asserted. In *Schnarr*, the defenses of good faith and probable cause were accepted by the district court and the action was dismissed. The court of appeals reversed the district court and held that although the defenses of good faith and probable cause were available to the officers in the action for damages, the father did have standing to bring a declaratory judgment action. The case turned on the issue of whether the plaintiff had standing to bring an action at all. The defendants relied, as did the Colorado court in *Jones*, on the argument that one may not sue for the deprivation of the

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<sup>61</sup> 381 U.S. 479 (1965).

<sup>62</sup> 262 U.S. 390 (1923).

<sup>63</sup> *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 290 (1923).

<sup>64</sup> *Skinner v. Oklahoma*, 316 U.S. 523 (1942).

<sup>65</sup> 502 F.2d 588 (8th Cir. 1974).



civil rights of another. The court established a two-step process by which it tested the plaintiff's standing in the action: (1) The party seeking relief must show that he is sufficiently affected by the action he is challenging to justify consideration by the court of the validity of the action; and (2) the plaintiff must show the action complained of affects him and not some third party.<sup>66</sup>

The court found that the father was sufficiently affected by the killing of his son to justify the court's considering the matter, reasoning that the state wrongful death statute created a vested right in the plaintiff to bring suit for the death of his minor son. The right was viewed as not being derivative, but rather, a new cause of action created in the father. The ground given for recovery was "the reciprocal duty of the child to render to its parents such services and earnings as the latter may reasonably expect."<sup>67</sup> The court quoted with approval a Missouri Supreme Court case which ruled that "the right of a parent to a minor's services is in the nature of a personal right arising out of the family relationship, not a property right arising out of a pseudo contractual relationship."<sup>68</sup>

In *Schnarr* the parent was found to be the "injured party" under section 1983, and was seen to be suing in his own right for injuries personally sustained.<sup>69</sup> This qualified him under the first of the court's two-part test for standing.

The court then turned to what it considered the more difficult question—whether the killing of plaintiff's son invaded his constitutionally protected rights under the due process clause of the fourteenth amendment. As most courts have done, the justices looked to see whether the interest was so deeply rooted in the traditions of Anglo-American law as to be considered fundamental. Citing *Meyer* and *Griswold*, the court focused on the familial relationship between parent and child and decided that such a relationship was indeed fundamental<sup>70</sup> and that the police

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<sup>66</sup> *Id.* at 593.

<sup>67</sup> *Id.*

<sup>68</sup> *Mennemeyer v. Hart*, 359 Mo. 423, 221 S.W.2d 960, 962 (1949) (quoted in *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974)).

<sup>69</sup> 42 U.S.C. § 1983.

<sup>70</sup> "The entire fabric of the Constitution and its purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and *raise a family* are of similar order and magnitude as the fundamental rights specifically protected." *Griswold v. Connecticut*, 381 U.S. 479, 495-96 (1964).

officers did deny the plaintiff a civil liberty—the right to raise a son.

*Schnarr* was decided by the Eighth Circuit two years prior to the Colorado high court's review of *Jones*, yet it was not mentioned in the court's opinion.

## V. THE REVIEW

At the time *Jones* was appealed to the United States Supreme Court, Colorado's position was clear: Section 1983 was silent on the issue of damages; section 1988 mandated resort to state law in such situations; Colorado's wrongful death statute was totally compatible with the purposes and objectives of section 1983; and thus it was totally controlling in both actions to the extent that the federal cause of action became a mere redundancy of the state redress. The Colorado court had ruled that merger was appropriate, that no section 1983 action exists independent of state law, that a survivor may not sue under section 1983 for injuries suffered by the deceased, and that any damages recoverable under section 1983 would be limited by Colorado law to direct pecuniary loss. As shown above, these rulings were contrary to those of a majority of the state and federal courts which had addressed these issues.

The case was ripe for review. The United States Supreme Court had not previously had an opportunity to address the issue as to what the appropriate measure of damages is in such an action. Additionally, the petitioner was arguing that the shooting of a child was a constitutional deprivation of a civil right protected by the liberty clause of the fourteenth amendment. This issue also had never been addressed by the nation's highest court.

It appeared that the case would turn upon a discussion of two issues: (1) A *Davis* type discussion as to what is or what is not a valid protectable liberty interest; and (2) whether or not a state's net pecuniary loss rule is consistent with the purposes of the Civil Rights Act?

Unfortunately, the court declined to discuss these important issues. Instead the justices split 5-3 (one justice not hearing the case) as to what had actually been presented to the Colorado court. Five justices, as stated in their per curiam opinion, believed that there had been a shift in the posture of the case upon appeal. These justices ruled that the question presented in the petition for certiorari had been mooted by petitioner's oral argu-

ment. Thus the writ of certiorari was dismissed as being "improvidently granted."<sup>71</sup>

The rationale given by the Court for the dismissal was that they had granted certiorari to look at the issue of damages; that is, to see if the Colorado state limitation was proper in the section 1983 action. A necessary prerequisite for this review, as stated by the Court, was that the plaintiff must be suing for the *same injury* under section 1983 as he is under the state wrongful death statute. The Court reasoned that this situation could not exist if the damages sought under section 1983 were for injuries to a different plaintiff than the one allegedly wronged under the state statute. The majority argued that petitioner had shifted her case to a different wrong upon oral argument—the deprivation of the mother's right to raise her child without interference. Citing the Colorado position that wrongful death is only a property tort action, not an action for injuries to the person, the Court said that the two actions were clearly distinct.<sup>72</sup>

Justices White, Brennan, and Marshall, however, felt that the question of a mother's deprivation of a constitutionally protected right had been sufficiently raised in the Colorado Supreme Court. These justices believed that the issues were important and should have been decided. In support of their position, they pointed to the Colorado court's specific rejection of each of petitioner's claims in support of her 1983 action, specifically the fourth claim where she alleged violation of her own constitutional rights. The minority cited the allegations made in petitioner's original complaint which clearly could be read so as to include a claim for invasion of the mother's own civil liberties.<sup>73</sup> In the

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<sup>71</sup> 97 S. Ct. 2283 (1977). The Court cited Supreme Court Rule 23(1)(c) and *Belcher v. Stengel*, 429 U.S. 118 (1926), as authority for the dismissal.

<sup>72</sup> *Fish v. Liley*, 120 Colo. 156, 28 P.2d 930 (1949).

<sup>73</sup> Both the per curiam and the minority opinions cited portions of petitioner's complaint as authority for their respective positions as to what had actually been set forth below. The majority cited a somewhat edited version of petitioner's third claim (the section 1983 claim) to support their contention that a case for the deprivation of the mother's civil rights had not been sufficiently made. The majority opinion, in contrast, quoted the third claim in full. This claim taken in full context clearly may be read as to include a definite constitutional claim for the deprivation of the petitioner's own civil rights.

A comparison of the two footnotes is set forth below:

Per Curiam note six:

6. Her complaint alleged that *she* was deprived of:  
"a. Her child's right to life

words of Justice White, "[t]hese issues were addressed directly by the Colorado Supreme Court, and I doubt that that court misunderstood the scope of the litigation before it or reached and decided issues not fairly presented by the appeal."<sup>74</sup>

The minority opinion added that, in addition to the question of whether a mother's civil liberties included the right to raise a son free from state interference, the question of the state damage limitation was also a valid question for review.

### CONCLUSION

As it now stands in Colorado, state damage limitations appear to control federal actions brought in state court in conjunction with state statutory claims. This is in spite of an express overruling of the Colorado decision by a minority of the United States Supreme Court and a definite effort to avoid endorsement of the decision by a majority of the justices.

The situation in Colorado at present is that the *Jones* decision stands as a very weak precedent for future plaintiffs. The results of the decision might be attacked on one of several grounds. First, a future plaintiff will be careful to sue in behalf of the estate of the deceased to avoid any problems with the issue of standing. Once standing is firmly established, a direct attack on the damage issue may be launched by showing the incompatibility of the state net pecuniary loss rule with the aims and purposes of the federal Civil Rights Act. Section 1988 does not re-

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"b. The right to her child's freedom from physical abuse, coercion, intimidation, and physical death; and

"c. Her right to her children's equal protection of the laws."

Nowhere does she allege her asserted constitutional right to raise her child.

97 S. Ct. 2283, 2286 n.6 (1977).

Justice White's note two:

2. Petitioner's first two claims for relief were grounded on state law. The third claim for relief stated:

"During all times mentioned in this Complaint, Douglas Hildebrandt while acting under color of law, *intentionally deprived the Plaintiff of her rights, security and liberty secured to her by the Constitution of the United States, including but not limited to:*

"a. Her child's right to life;

"b. The right to her child's freedom from physical abuse, coercion, intimidation, and physical death; and

"c. Her right to her children's equal protection of the law." App. 3. (emphasis added).

97 S. Ct. 2283, 2288, n.2 (1977).

" 97 S. Ct. at 2290.

quire the incorporation of such inconsistent provisions. The Supreme Court has left open for future decisions the evaluation of a mother's rights in the raising of a child. Clearly a *Schnarr*-type argument could be made that the right to raise a child free from state interference is a fundamentally protected civil liberty.

In any case, the failure of the Colorado courts to fairly address these issues in the light of recent case law and the hesitancy of a majority of the United States Supreme Court to address the liberty issue has done much to confuse and little to clarify state-federal relationships in the context of section 1983 actions.<sup>75</sup>

Bruce A. Lampert

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<sup>75</sup> The fact that the issues presented in *Jones* have merely been postponed and not resolved is exemplified by a recent filing in the Colorado District Court. Walter Gerash, one of the attorneys for the petitioner in *Jones*, has been retained by the survivors of Arthur Espinoza, a victim of a July 30th shooting in Curtis Park by a Denver policeman. The issues presented in *Jones* have again been raised.

In his pleadings Mr. Gerash has not filed a wrongful death action at all, but rather he has filed only a section 1983 claim. In addition, the action is being brought in the name of the estate of Mr. Espinoza, pleading deprivation of his constitutional rights as well as those of his family. The validity of the Colorado decision in *Jones* will be tested shortly.